

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

No. 23976-4-III

Respondent,

v.

Division Three

DENTON JAY MORGAN,

Appellant.

UNPUBLISHED OPINION

SCHULTHEIS, J. — After a night-long altercation with his girl friend, Denton Morgan was charged with one count of attempted second degree rape. A jury found him guilty as charged. On appeal, he contends the evidence is insufficient to show forcible compulsion. He also argues pro se that he had ineffective assistance of counsel. Because we find that forcible compulsion is not an element of attempted second degree rape, and because we additionally conclude that Mr. Morgan fails to show ineffective assistance of counsel, we affirm.

Facts

Mr. Morgan and his girl friend, M.S., began living together in September 2003.

By May 2004, M.S. had decided it was time to separate. From late May 16 to early the next morning, the couple argued about her decision. Mr. Morgan had been drinking and became progressively angrier. He would not let M.S. sleep or leave the house.

At one point early in the morning, Mr. Morgan accused M.S. of cheating on him. When she denied it, he said, “Well, maybe I ought to ‘F’ you up the ass.” Report of Proceedings at 31. M.S. was sitting on the couch at the time. Mr. Morgan shoved her back, pushed up her legs, and jabbed her once in the rectum with his fingers. M.S., who was wearing underpants and pajamas, screamed in pain. Mr. Morgan then covered her mouth and told her he was going to rip her head off. He rammed his fingers down her throat, injuring the inside of her mouth. After that, he calmed down and M.S. agreed to have sex with him to prevent another angry outburst.

Later that morning, M.S. woke up and left the house while Mr. Morgan slept. She went to a friend’s house and the friend’s mother called police. After M.S. gave her statement to police officers, she was surprised to hear that they considered Mr. Morgan’s attack a rape or attempted rape. In her opinion, she was merely the victim of domestic abuse. Accordingly, she refused to submit to a rape examination.

Mr. Morgan was arrested on May 17, 2004 and charged with one count of attempted rape in the second degree. RCW 9A.28.020(1); 9A.44.050(1)(a). At his jury trial, M.S. testified that her statement to the police was accurate but that she still did not

consider Mr. Morgan's actions as constituting attempted rape. Defense counsel moved to dismiss at the close of the State's case in chief, arguing insufficient evidence of forcible compulsion. The motion was denied and the jury reached a verdict of guilty.

Forcible Compulsion

Mr. Morgan contends on appeal that the evidence is insufficient to prove the elements of attempted rape in the second degree, specifically the element of forcible compulsion. Because this is a review of the sufficiency of the evidence, we consider all evidence and inferences from the evidence in the light most favorable to the State to determine whether a rational trier of fact could have found the elements of the crime beyond reasonable doubt. *State v. Townsend*, 147 Wn.2d 666, 679, 57 P.3d 255 (2002).

Relevant to these facts, rape in the second degree requires proof that the defendant engaged in sexual intercourse with another person by forcible compulsion. RCW 9A.44.050(1)(a). The attempt to commit this crime requires proof that the defendant "took a substantial step toward commission of the crime, with the intent to have sexual intercourse." *State v. Jackson*, 62 Wn. App. 53, 55, 813 P.2d 156 (1991); RCW 9A.28.020(1). A substantial step is conduct that strongly corroborates the actor's criminal purpose. *Townsend*, 147 Wn.2d at 679. Sexual intercourse is defined in part as "any penetration of the vagina or anus however slight, by an object, when committed on one person by another." RCW 9A.44.010(1)(b); *State v. Tili*, 139 Wn.2d 107, 114, 985

P.2d 365 (1999).

Mr. Morgan does not challenge the evidence to support the elements of substantial step or intent to have sexual intercourse. Clearly his statement that he “maybe . . . ought to ‘F’ [her] up the ass” is strongly indicative of an intent to have sexual intercourse with M.S. And by shoving her back on the couch, pushing up her legs, and jabbing her rectum with his fingers, he at least took a substantial step toward the commission of rape in the second degree. *See Jackson*, 62 Wn. App. at 57 (a physical assault upon the victim, coupled with an avowed purpose to have sexual intercourse with her, is sufficient to meet the substantial step requirement). Accordingly, Mr. Morgan confines his argument to the sufficiency of the evidence to support forcible compulsion.

Forcible compulsion is the force used or threatened to overcome the resistance of the victim. *State v. Ritola*, 63 Wn. App. 252, 254-55, 817 P.2d 1390 (1991). When prosecuting the completed crime of rape in the second degree, the State must present evidence that the defendant used more force than is normally needed to achieve sexual intercourse, and that this force overcame the victim’s resistance. *Id.* at 255-56. The charge of *attempted* rape in the second degree, however, does not require the State to prove that the defendant actually employed force that overcame the victim’s resistance. As stated above, the only elements that must be established are that the defendant took a substantial step toward commission of rape in the second degree with the intent to have

sexual intercourse. *Jackson*, 62 Wn. App. at 55.

Mr. Morgan's statement about anal intercourse, when viewed in the light most favorable to the State, supports any rational juror's conclusion beyond a reasonable doubt that he intended to have anal sexual intercourse with M.S. A rational juror could also conclude that his conduct in pushing her back and jabbing her rectum with his fingers was a substantial step toward engaging in sexual intercourse with forcible compulsion. The evidence is sufficient to support the elements of attempted rape in the second degree.

Assistance of Counsel

Pro se, Mr. Morgan contends he had ineffective assistance of trial counsel. He argues generally that he had difficulty meeting with his counsel and specifically contends defense counsel refused to let him testify at trial.

To show ineffective assistance of counsel, Mr. Morgan must demonstrate that his counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the outcome of the trial would have been different. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 672-73, 101 P.3d 1 (2004); *State v. Varga*, 151 Wn.2d 179, 198, 86 P.3d 139 (2004). Failure to establish either element of this test defeats the claim of ineffective assistance of counsel. *Davis*, 152 Wn.2d at 673. Our presumption of effective assistance of counsel must be overcome by a clear showing of incompetence. *Varga*, 151 Wn.2d at 199.

In Washington, the state constitution explicitly protects a criminal defendant's right to testify. *State v. Robinson*, 138 Wn.2d 753, 758, 982 P.2d 590 (1999). This right may not be abrogated by the court or by defense counsel. *Id.* Although a defendant may knowingly, voluntarily, and intelligently waive the right to testify, the trial court does not need to obtain that waiver on the record. *Id.* at 758-59.

A defendant who is able to prove that his counsel prevented him from testifying has satisfactorily demonstrated that counsel's conduct was deficient. *Id.* at 766. This proof must come in the form of specific allegations of fact supported by the record. *Id.* at 760. Mr. Morgan's allegation that trial counsel prevented him from taking the stand or making a statement is not supported by anything in the record. He also fails to address the issue of prejudice. *See id.* at 768-69 (we will not presume prejudice in cases in which trial counsel prevents the defendant from taking the stand). Accordingly, Mr. Morgan does not establish either element of the test for ineffective assistance of counsel. *Davis*, 152 Wn.2d at 673.

Affirmed.

A majority of the panel has determined that this opinion will not be printed in the

No. 23976-4-III
State v. Morgan

Washington Appellate Reports but it will be filed for public record pursuant to RCW
2.06.040.

Schultheis, J.

WE CONCUR:

Sweeney, C.J.

Kato, J.